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July 21, 1998

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Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Stop Code - 1170
Washington, D.C. 20554

Re: Comments Of Hearst-Argyle Television, Inc.
MM Docket No. 98-35

Dear Ms. Salas:

Transmitted herewith on behalf of Hearst-Argyle Television, Inc. are an original and eleven (11) copies of Comments in response to the *Notice Of Inquiry*, FCC 98-37, released March 13, 1998, issued in MM Docket No. 98-35.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

Wade H. Hargrove

Counsel to Hearst-Argyle Television, Inc.

WHH/ks

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

1998 Biennial Regulatory Review—)
Review of the Commission's Broadcast)
Ownership Rules and Other Rules Adopted)
Pursuant to Section 202 of the)
Telecommunications Act of 1996)

MM Docket No. 98-35

To: The Commission

COMMENTS OF HEARST-ARGYLE TELEVISION, INC.

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July 21, 1998

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Summary

The newspaper/broadcast cross-ownership rule should be repealed. The rule is antithetical to competition in a free market, stifles innovation in a world of media convergence, and may actually hinder the expression of diverse viewpoints.

The competitive media marketplace of the late 1990s is fundamentally different than that of the early 1970s. Spectrum scarcity, the cornerstone upon which the public's interest in the newspaper/broadcast cross-ownership rule is ultimately premised, has been altered by the invisible hand of the marketplace which has both fostered competition within the media and communications industries and spurred technological change that has led to the development of new industries. Consequently, with the spectrum scarcity rationale thus altered by the information technology revolution, it can no longer be taken for granted that the Commission's goal of fostering local viewpoint diversity can remain dependent on rules prohibiting the common ownership of local broadcast stations and newspapers.

Just as importantly, the Commission should no longer act under an assumption that, in this instance, activist, regulatory intervention is desirable or necessary to promote local viewpoint diversity. Instead, the *assumption* should be that competition has rendered the newspaper/broadcast cross-ownership rule unnecessary.

The newspaper/broadcast cross-ownership rule reflects the competitive and regulatory environment at its time of adoption. A quarter century later, the rule is no longer wise, efficacious, or necessary.

While the Commission, in promulgating the rule, sought to promote the twin goals of local

viewpoint diversity and economic competition, those goals, in turn, rested on the two assumptions already pointed out, (1) that spectrum was scarce and (2) that a visible regulatory hand was favored over the free market. The dynamics of technological innovation, competitive market forces, and changing sentiment both at the Commission and on Capitol Hill have altered the bases underlying these assumptions in this instance. Therefore, lacking its foundational bases, logic and sound public policy require that the newspaper/broadcast cross-ownership rule be abolished.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
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1998 Biennial Regulatory Review---)	MM Docket No. 98-35
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Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
To: The Commission		

COMMENTS OF HEARST-ARGYLE TELEVISION, INC.

Hearst-Argyle Television, Inc. ("Hearst-Argyle") by its attorneys, hereby files the following comments in response to the *Notice of Inquiry* ("Notice"), FCC 98-37, released March 13, 1998, in the above-captioned proceeding. The *Notice* seeks comment on the Commission's broadcast ownership rules, including the daily newspaper/broadcast cross-ownership rule, as part of the Commission's statutorily-mandated biennial review to determine whether its ownership rules continue to serve the public interest. Hearst-Argyle submits that the daily newspaper/broadcast cross-ownership rule is antithetical to competition in a free market, stifles innovation in a world of media convergence, and may actually hinder the expression of diverse viewpoints. Accordingly, the rule should be repealed.

I. Statement Of Interest

Hearst-Argyle is a publicly-traded company that currently owns or manages 15 television stations and 2 radio stations in geographically diverse markets. The company's television stations reach approximately 11% of U.S. television households, making it the fourth largest non-network

owned television station group in the country.¹ Hearst-Argyle's principal shareholder is Hearst Broadcasting, Inc., which is, in turn, owned by The Hearst Corporation, a privately-held company with broad media interests, including newspapers and publishing, broadcasting, and cable television networks.²

II. The Conditions Existing At The Time The Newspaper/Cross-Ownership Rule Was Promulgated No Longer Exist, And The Dynamics Of The Media Marketplace Have Undercut Any Need For The Rule

The daily newspaper/broadcast cross-ownership rule prohibits common ownership of a broadcast station and daily newspaper within the 2 mV/m contour of an AM station, the 1 mV/m contour of an FM station, or the Grade A contour of a television station.³ The Commission adopted the rule in 1975 when the nature of the media and the accompanying regulatory environment were

¹ Hearst-Argyle is in the process of acquiring the broadcast group of Pulitzer Publishing Company. Pulitzer currently owns and operates nine television stations and five radio stations. After this transaction, which is expected to close by year-end 1998, the 24-station television group will reach approximately 16.5% of U.S. television households.

² Hearst Newspapers, the publisher of 12 daily newspapers located in both major and smaller markets, is also filing independently in this proceeding as an interested party.

³ See 47 C.F.R. § 73.3555(d).

This section follows the analytical framework suggested by Commissioner Furchtgott-Roth by considering

- (i) the original purpose of the particular rule in question; (ii) the means by which the rule was meant to further that purpose; (iii) the state of competition in the relevant market at the time the rule was promulgated; (iv) the current state of competition as compared to that which existed at the time of the rule's adoption; (v) and, finally, how any changes in competitive market conditions between the time the rule was promulgated and the present might obviate, remedy, or otherwise eliminate the concerns that originally motivated the adoption of the rule.

Notice, Separate Statement of Commissioner Harold W. Furchtgott-Roth.

significantly different than they are today.⁴ Following the adoption of the duopoly rule, the one-to-a-market rule, the financial interest and syndication rules, and the fairness doctrine, as well as the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the newspaper/broadcast cross-ownership rule was promulgated at the apex of regulatory intervention in the marketplace.

Although, in connection with its adoption of the newspaper/broadcast cross-ownership rule, the Commission also ordered divestiture in 16 instances of common ownership where harm to competition was believed "egregious," the cross-ownership ban was largely intended as a prophylactic measure. Indeed, the Commission did not find that existing newspaper/broadcast combinations had not served the public interest, did not find such combinations necessarily spoke with one voice, did not find a pattern of specific abuses, and did not find that they generally were harmful to competition.⁵ Instead, the Commission was principally motivated by a policy of promoting diversification of ownership. More precisely, while the Commission repeatedly stated that its prime concern was viewpoint diversity,⁶ the Commission used a rule aimed at diversification

⁴ See Multiple Ownership of Standard, FM and Television Broadcast Stations, *Second Report and Order*, 50 FCC 2d 1046, 32 Rad. Reg. 2d (P & F) 954 ("Second Report and Order"), recon., 53 FCC 2d 589, 33 Rad. Reg. 2d (P & F) 1603 (1975), *aff'd sub nom. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("NCCB").

⁵ See *Second Report and Order* at ¶¶ 99-117; see also *NCCB*, 436 U.S. at 786. In fact, a Commission Staff study found that, "on the average, co-located newspaper-owned TV stations programmed 6% more local news, 9% more local non-entertainment, and 12% more total local including entertainment than do other TV stations" and that these differences were statistically significant. *Second Report and Order* at App. C.

⁶ See *Second Report and Order* at ¶¶ 99, 104, 110-12. Although the Commission stated that its multiple ownership rules rested on the twin goals of "diversity of viewpoints and economic competition," *id.* at ¶ 99, there is little doubt that the Commission's nominal concern with economic competition took a back seat to its overarching concern with viewpoint diversity, as the Commission

(continued...)

of ownership as the intended means to achieve viewpoint diversity. This relationship between viewpoint diversity and ownership diversity is significant, for it was on that basis that the prospective cross-ownership rule was justified. The Supreme Court summarized the Commission's understanding thus: "Increases in diversification of ownership would possibly result in enhanced diversity of viewpoints and, given the absence of persuasive countervailing considerations, 'even a small gain in diversity' was 'worth pursuing.'"⁷

But the nature of broadcast ownership itself and the need and means to diversify it were premised on a fundamental assumption: spectrum scarcity. In fact, the Commission's broad delegated authority to allocate broadcast licenses in the "public interest" has long been traced to the physical scarcity of broadcast frequencies.⁸ In *National Citizens Committee for Broadcasting*, moreover, the Supreme Court's decision to uphold the constitutionality of the newspaper/broadcast cross-ownership rule rested fundamentally on a spectrum scarcity rationale:

The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential, as we have often recognized. No one here questions the need for such allocation and regulation, and, given that need, we see nothing in the First Amendment to prevent the Commission from allocating licenses

⁶(...continued)

itself essentially admitted, *see id.* at ¶ 110 (stating that "we have analyzed the basic media ownership questions in terms of this agency's *primary concern*—diversity of ownership as a means of enhancing diversity in programming service to the public—rather than in terms of a strictly antitrust approach" (emphasis added)).

⁷ *NCCB*, 436 U.S. at 786 (quoting *Second Report and Order* at 1076, 1080 n.30).

⁸ *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 210-18 (1943); *Red Lion*, 395 U.S. at 375-77, 387-88; *NCCB*, 436 U.S. at 795, 799.

so as to promote the "public interest" in diversification of the mass communications media.⁹

To fully understand the context of the Commission's decision-making with respect to the newspaper/broadcast cross-ownership rule, it is necessary to recall the competitive marketplace of the media and communications industries at the time.

In 1970, the year in which the newspaper/broadcast rulemaking proceeding began:

- There were 690 commercial television stations, 508 VHF and 182 UHF.¹⁰
- Of the 690 commercial stations, 600 (87%) were affiliated with one of the three networks.¹¹
- Network stations received 90% of the television viewing audience.¹²
- There were 6760 radio stations, 4292 AM and 2468 FM.¹³
- FM radio and UHF television were weak and struggling for market acceptance.
- Cable was principally a retransmission technology.
- There were 2490 cable systems passing 9 million homes and serving 4.5 million television households.¹⁴
- MDS, MMDS, SMATV, LPTV, and DBS did not exist, nor did VCRs and the Internet.

⁹ *NCCB*, 436 U.S. at 799 (citations omitted).

¹⁰ See *Syndication and Financial Interest Rules, Tentative Decision*, FCC 83-377, 54 Rad. Reg. 2d (P & F) 457 (1983) ("*Tentative Decision*"), at ¶ 108.

¹¹ See *id.*

¹² See *id.*

¹³ See 66 *Television and Cable Factbook* (1998), at I-14.

¹⁴ See *Tentative Decision* at ¶¶ 109, 111.

- In 1975, there were 1756 daily newspapers.¹⁵
- There were 96 co-located newspaper/television combinations.¹⁶

What stands out in this competitive landscape is the dominance of over-the-air television stations with few other media outlets available. Against this background, the Commission's concern with, and resulting promulgation of, the newspaper/broadcast cross-ownership rule is understandable.

The competitive landscape of the early 1970s must be contrasted with the radically different competitive environment of today. In every measurable way, there is far more competition for listeners/viewers/customers, while the number of speakers' outlets has increased dramatically:

- There are 1211 commercial television stations, 559 VHF and 652 UHF.¹⁷ This represents an increase of more than 75% in total commercial television stations, but, more significantly, the increase in the number of VHF stations has been only 10%, while the increase in the number of UHF stations has been 258%.
- Of commercial television stations, 839 are affiliated with one of the four major networks.¹⁸ Thus, today, only 69% of commercial television stations are affiliated with one of the four major networks, a drop of nearly 21% in relative percentage terms.
- Network stations receive approximately 50% of the television

¹⁵ See Newspaper/Radio Cross-Ownership Waiver Policy, *Notice of Inquiry*, FCC 96-381 (released Oct. 1, 1996) ("*Newspaper/Radio Notice*"), at ¶ 9.

¹⁶ See *Second Report and Order* at ¶ 112 n.29. By the time the cross-ownership rule was adopted that number had fallen to 79 through attrition.

¹⁷ See Broadcast Station Totals As of May 31, 1998, *News Release* (released June 19, 1998) ("*Broadcast Station Totals*"). In addition, there are 368 educational television stations (125 VHF and 243 UHF) making a total of 1579 television stations.

¹⁸ See 66 Television and Cable Factbook (1998), at I-95.

viewing audience, representing an incredible decline of more than 44% in relative percentage terms.

- In the fall of 1998, there will be seven broadcast networks.
- There are 10,339 commercial radio stations, 4724 AM and 5615 FM.¹⁹ This represents an increase of 53% in total commercial radio stations, an increase of only 10% in the number of commercial AM stations, but an increase of more than 127% in the number of commercial FM stations.
- There are 10,838 cable systems passing more than 97% of all homes and serving 64.2 million television households.²⁰ This demonstrates an increase of 315% in the number of cable systems, the practically ubiquitous availability of cable, and a staggering 1327% increase in the number of television households subscribing.
- In 1996, there were 1556 daily newspapers.²¹ In just 20 years, the number of dailies has thus decreased more than 11% at a time when other media outlets have seen explosive growth.
- There remain only 21 co-located newspaper/television combinations, a decline of 78%.

In addition to these changes in media existing in the early 1970s, the last 25 years have seen the introduction and tremendous growth of new local media outlets, many created largely as the result of technological innovation:

- There are now 2089 low power television stations, 559 VHF and 1530 UHF.²²

¹⁹ See *Broadcast Stations Totals*. In addition, there are 1980 noncommercial educational FM stations making a total of 12,319 radio stations.

²⁰ See 66 *Television and Cable Factbook* (1998), at I-96; *Notice* at ¶ 26.

²¹ See *Newspaper/Radio Notice* at ¶ 9.

²² See *Broadcast Stations Totals*.

- There are 5.1 million subscribers to the four DBS providers.²³
- In addition to DBS subscribers, there are approximately 4 million home satellite dish ("HSD") users.²⁴
- There are 252 MMDS systems in operation with approximately 1.2 million subscribers.²⁵
- There are approximately 3400 SMATV operators serving 1.16 million subscribers.²⁶
- More than 88% of U.S. television households own a VCR.²⁷
- 42% of American households own a personal computer with nearly the same percentage accessing an online service.²⁸
- By the end of 1997, the Internet user universe in the United States consisted of 60 million adults and 20 million children. By the end of 1998 it is estimated that the Internet user universe will consist of 75 million adults and 25 million children with 28 million Internet user households and 15 million direct-paying Internet Service Provider user households.²⁹

Hearst-Argyle submits that the local competitive media marketplace of the late 1990s is fundamentally different than that of the early 1970s. The notion of spectrum scarcity, the

²³ See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Fourth Annual Report*, FCC 97-423 (released Jan. 13, 1998) ("*Fourth Annual Report*"), at ¶ 55.

²⁴ See *id.* at ¶ 69.

²⁵ See *id.* at ¶¶ 73, 75.

²⁶ See *id.* at ¶ 84.

²⁷ See *id.* at ¶ 11.

²⁸ See Steve Lohr, *Media Convergence. Bold Vision of One-Stop Shopping Propels Mergers of Phone, Cable and TV Providers*, N.Y. TIMES, June 29, 1998, at A1.

²⁹ See Emerging Technologies Research Group, *User Trends* (visited July 7, 1998) <<http://etrg.findsvp.com/timeline/trends.html>>.

cornerstone upon which much of the Commission's public interest rationales has depended (including, ultimately, the newspaper/broadcast cross-ownership rule itself), has been altered both by competition within the media and by technological change that has led to the development of new communications companies.

III. The Commission Should Now Assume That Local Competition Has Rendered The Newspaper/Broadcast Cross-Ownership Rule Unnecessary

As noted above, the newspaper/broadcast cross-ownership rule was promulgated during a period when regulatory intervention was at its peak. The assumption was that the Commission's policy of promoting the "widest possible dissemination of information from diverse and antagonistic sources"³⁰ mandated this rule. In effect, the Commission placed a heavy burden of proof on members of the communications industries to show why the prohibition of common ownership of local broadcast stations and newspapers would not be necessary to assure local viewpoint diversity and economic competition. Members of the existing industry hotly contested the issue but to no effect³¹

The assumption that the prohibition is necessary and desirable has now been replaced by an underlying assumption by policy makers that the marketplace has changed and that competition is the better means to maximize the public interest objective. Over the last dozen years or so, both the Commission and Congress have recognized the dynamics of the new competitive media environment, and both have embraced a new competition-based model of regulation. For example,

³⁰ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

³¹ See *Second Report and Order* at ¶ 6 (recognizing that "most parties" opposed the rule changes); see also *id.*, *passim*.

the Commission has

- declared, in 1985, that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today," and that, as a result of the expansion of the information services marketplace, it was no longer necessary to rely upon "intrusive government regulation in order to assure that the public has access to the marketplace of ideas"³²;
- repealed the fairness doctrine, the financial interest and syndication rules, and the prime time access rule;
- relaxed the "one-to-a-market" rule to allow common ownership of a television station and radio station in the same market in certain circumstances³³; and
- raised the national cap on the number of television and radio stations that one entity can own.

More significantly, Congress itself has adopted a pro-competitive telecommunications policy by:

- enacting the Telecommunications Act of 1996 ("Telecom Act"), a sweeping new law that unabashedly intends to sweep away regulation and promote a competitive environment in which telecommunications technologies will flourish in the twenty-first century³⁴;
- removing the national cap on the number of television and radio stations that one entity can own and mandating generous caps on the number of radio stations that one entity can own in a single market.

³² General Fairness Doctrine Obligations of Broadcast Licensees, *Report*, 102 FCC 2d 145, 58 Rad. Reg. 2d (P & F) 1137 (1985), at ¶¶ 5-6.

³³ This rule is currently subject to open proceedings. See *Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992); *Second Further Notice of Proposed Rule Making* in Docket Nos. 91-221 and 87-8, 11 FCC Rcd 21655 (1996).

³⁴ The Telecom Act was clearly intended to establish a "pro-competitive de-regulatory national policy framework" for the telecommunications industry. H.R. REP. NO. 104-458, 104th Cong. 2d Sess. 1 (1996).

- repealing the statutory ban on cable/broadcast cross-ownership and directing the Commission to repeal its cable/network cross-ownership rule; and
- repealing the statutory ban on telephone companies competing with cable operators and thereby fostering the development of open video systems.

Of particular relevance to the newspaper/broadcast cross-ownership rule, Congress has removed restrictive language in its appropriations bills that previously prevented the Commission from reviewing not only its waiver policy under the rule, but the rule itself.³⁵ In response to lifting this ban, the Commission stated in its *Notice of Inquiry* regarding its newspaper/radio cross-ownership waiver policy that, while it “clearly has the authority to reevaluate its waiver policy for newspaper/broadcast combinations[,] it is without specific guidance on whether or how that authority should be exercised.”³⁶ Hearst-Argyle submits that the deregulatory thrust of other congressional actions and mandated biennial review do provide guidance: The newspaper/broadcast cross-ownership rule is no longer off limits but rather must be carefully scrutinized to determine its continuing relevance.

In fact, the congressionally-mandated biennial review dictates the approach the Commission should take. The operating assumption of the Commission should be that competition—sooner, rather than later—will render the newspaper/broadcast cross-ownership rule unnecessary. There is no other reason for section 202(h) of the Telecom Act to require that the Commission determine every two years whether this ownership rule is “necessary in the public interest as the result of

³⁵ See *Notice* at ¶ 29 and ¶ 29 n.48.

³⁶ *Newspaper/Radio Notice* at ¶ 7.

competition.³⁷

The incipient deregulatory approach at the Commission, outlined above, has therefore been quickened by bipartisan reform efforts on this issue in Congress. When these sentiments are considered together with the pro-competitive bias inherent in the Telecom Act, the burden of proof of the public's interest in retention of the newspaper/broadcast cross-ownership rule should rest firmly with the Commission; it should not be for opponents of the rule to prove that its existence is no longer in the public interest.

IV. The Rationale Of Spectrum Scarcity Can No Longer Justify The Newspaper/Broadcast Cross-Ownership Rule In A Marketplace Premised On Free, Open, And Vigorous Competition As The Means To Best Effectuate The Public Interest, Including The Promotion Of Local Viewpoint Diversity

Hearst-Argyle believes that the basic assumption that spectrum is scarce has been altered by the changes brought about in the media and communications industries as a result of the information technology revolution. Consequently, with the spectrum scarcity rationale modified by technological change, it can no longer be taken for granted that the Commission's goal of fostering local viewpoint diversity needs to be furthered through the newspaper/broadcast cross-ownership

³⁷ Hearst-Argyle points out that, in agency terms, two years is an incredibly short time. Because the Commission has chosen to proceed through a Notice of Inquiry prior to issuing a Notice of Proposed Rule Making, by the time any rulemaking proceeding is complete, or shortly thereafter, the Commission will be required to begin the process anew to justify retention of the rule. This pressure on the Commission to act quickly, and, if necessary, repeatedly underscores Congress's sentiment that this ownership rule should give way in the face of a competitive marketplace—sooner, rather than later. Cf. *Notice*, Separate Statement of Commissioner Michael Powell ("In mandating that we review these ownership rules every two years, Congress appeared primarily concerned that we adjust or eliminate these rules, if as is anticipated by the Telecommunications Act, sufficient robust competition develops."); *id.*, Separate Statement of Commissioner Harold W. Furchtgott-Roth (stating that the statute "clearly indicates that Congress wanted the Commission to consider the very real possibility that competitive forces have eliminated or decreased the need for ownership regulation and that our rules should keep pace, as near as possible, with the times").

rule.

Former Chairman Mark Fowler, near the beginning of his tenure, challenged the concept of spectrum scarcity by noting that scarcity is a condition that necessarily affects all industries and that, in our capitalistic system, the marketplace is permitted to allocate such scarce goods. It is by this process that "consumers' interests and society's interests are well served."³⁸ From this analysis of scarcity, Chairman Fowler ultimately concluded that "[e]conomic freedom and freedom of speech go hand in hand."³⁹ Chairman Fowler's observations are noteworthy in that they indicate that, for some time now, the notion that regulating in the public's interest on the basis of scarcity has been foundering. In addition, the arguments against the empirical validity of spectrum scarcity are now manifest.⁴⁰ Hearst-Argyle agrees with the view expressed by Commissioner Furchtgott-Roth that "the factual validity of spectrum scarcity is a critical element of the analysis required by [section] 202(h)."⁴¹

As discussed above, the competitive landscape and market conditions of the early 1970s have been vastly transformed over the last quarter century. That earlier period was a time when UHF television and FM radio were weak and struggling for market acceptance, cable was in its infancy, and new media, such as DBS, wireless cable, and the Internet, did not yet exist. Today, there are more local traditional media outlets in absolute numerical terms (except, ironically, daily

³⁸ Mark S. Fowler, *The Public's Interest*, COMM & L. 51, 53 (1982).

³⁹ *Id.*; see also Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

⁴⁰ See, e.g., *Notice*, Separate Statement of Commissioner Harold W. Furchtgott-Roth, at n.1 (listing numerous criticisms of the spectrum scarcity rationale).

⁴¹ *Id.* at text accompanying n.3.

newspapers), and there are more new *types* of media outlets. Deregulation has permitted the creation of dozens of cable networks.⁴²

Merely pointing to the wide diversity of local media outlets—far greater than at any time in history—will be insufficient to convince some that, in the context of ultimately justifying the newspaper/broadcast cross-ownership rule, the notion of spectrum scarcity is obsolete.⁴³ But two integral characteristics of today's media conclusively establish the changes that compel *de novo* analysis of the spectrum scarcity rationale: media convergence and speaker access.

First, technological innovation in the telecommunications industries has led to the convergence of previously divergent media. In the Telecom Act, Congress affirmatively recognized and promoted this convergence of telecommunications technologies by permitting long-distance companies, local exchange carriers, and cable operating companies to compete with one another. What this convergence essentially means is that broadcast, cable, satellite, and the Internet ultimately *are* all cyberspace. All media will be digitized (all new ones are born that way) and delivered over broadband networks. In this cyberspace, the concept of spectrum scarcity does not apply in the same manner. The question isn't how to allocate discrete blocks of electromagnetic spectrum to assure interference-free transmission and reception; instead, the issue is how to engineer multi-channel

⁴² By 1996, there were 126 basic cable networks. See *Fourth Annual Report* at ¶ 19.

⁴³ Some have said that the scarcity argument, no longer justified by the current reality of modern media, has been sustained only through a "semantic sleight-of-hand switching, in mid-argument," between two disparate uses of the word "scarcity," viz. scarcity in reference to the number of people simply wanting to use a broadcast station vis-à-vis the number of frequency slots available for operating stations. Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM. L.J. 51, 69 (1994). See also Don R. Le Duc, *Deregulation and the Dream of Diversity*, J. COMM. (Autumn 1982), at 164 (stating that our system has yet to "develop the capacity to distinguish between *channels* and *content* as the source of communications competition, a distinction that has eluded the federal government for the past half-century" (emphasis in original)).

high-bandwidth delivery systems and effectively route data packets. We are in the midst of this media convergence even now—the announced AT&T/TCI transaction; MSNBC, the Microsoft/NBC partnership, with outlets both on cable and the Internet; the development of WebTV; and the exclusively cyberspatial existence of “e-zines” such as *Slate*, to name only a few examples.

Second, it is fundamental to the nature of the new media to permit, encourage, and rely upon a multiplicity of avenues for speaker access. The traditional argument that broadcast media were scarce because not everyone could own a television or radio station to air individual views has now been altered. While it was always questionable whether the economic inputs of publishing—printing presses, paper, ink, and distribution systems—were any less scarce in economic terms than spectrum, cable and especially the Internet have vastly lowered the entrance costs for publication of one’s viewpoint in the local marketplace of ideas. Cable, for example, through its variety of local access, leased access, and PEG channels, has essentially made it possible for the average citizen to cablecast his views. Even more spectacularly, the Internet has brought world-wide publishing capabilities into the homes, schools, and libraries of virtually every American. By creating a personal homepage on the World Wide Web, participating in any of tens of thousands of listservs and Usenet newsgroups, or entering innumerable chat rooms, everyone has the capability to disseminate individual viewpoints to audiences wider than even traditional media present.⁴⁴

⁴⁴ Significantly, the costs of electronic publishing on the Web are far lower than speaker access costs in any other mass medium of communication. Monthly Internet access fees (approximately \$20) are lower than the average cable bill (\$28.83) (*see Fourth Annual Report* at ¶ 11 (reporting data on average monthly cable rate)). A WebTV can be purchased for \$300, less than the cost of many television sets, with prices expected to fall further. The majority of complete computer systems sold today retail for less than \$1000. “Penetration” of home Internet access is expected to pass 50% shortly. In addition, Internet access is widely available in schools and libraries, with universal access slated, which provides means of access to those otherwise too poor to own their own WebTV or computer. Although the costs of this electronic publishing are not negligible, it is vitally
(continued..)

In fact, the Supreme Court itself has recently noted the effect of conjoining the inapplicability of "scarcity" in the cyberspace world of the Internet with the breadth and depth of its avenues for speaker access:

[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."⁴⁴

Moreover, the idea that we all can become town criers or pamphleteers in cyberspace is not merely

⁴⁴(...continued)

important to recognize that these costs permit not just reception of diverse viewpoints but actual publication of them, in contradistinction to other media outlets. Ownership of a television set or radio, which in fact are possessed by virtually all Americans, permits only passive reception of viewpoints and confers no right or ability to communicate in response.

While electronic publishing of this sort has the potential to reach a world-wide audience, the World Wide Web is also developing strong, locally-directed communications channels. In addition to local information available through services such as CitySearch and Microsoft's Sidewalk for specific locales, many communities have developed local freenets, often with information on local government and its activities. Most state and many local governments now have their own Web pages. Usenet provides numerous interactive newsgroups of interest to local citizens, including groups that facilitate commercial transactions. And many locally-based Internet Service Providers, as well as certain businesses, including broadcasters and newspapers, host chat rooms that provide a forum for the discussion of political and social issues of local concern. Hearst-Argyle thus disagrees with those who claim that the Internet does not yet provide substantial information or facilitate debate on local issues. See *Notice* at ¶ 33.

⁴⁵ *Reno v. ACLU*, 117 S. Ct. 2329, 2344, 138 L. Ed. 2d 874, 896-97 (1997) (citations omitted).

theoretical: witness one Matt Drudge, a previously obscure figure who has recently garnered worldwide attention with his *Drudge Report*, available only over the Internet.⁴⁶

The empirical bases of "scarcity" have therefore been modified. First, in absolute numerical terms, there is a plethora of diverse local media outlets with a plentiful supply of voices to accommodate all listeners. In fact, the appeal of a competitive marketplace is the assurance that, if there is an audience for a particular message, one form of media or another will cater to it. Indeed, broadcasters, especially local radio broadcasters, have become expert at exploiting narrowcasting, appealing to multiple, diverse audiences through a variety of formats while wringing cost efficiencies from common ownership and generating economic efficiencies for advertisers.⁴⁷ At the same time, competition in the local marketplace of ideas is fostered, for media owners need to fill their various outlets with content.

Second, in economic terms, the flurry of media transactions following the deregulatory thrust of the Telecom Act demonstrates that there is an ample supply of media outlets available to willing buyers in the competitive marketplace. In fact, this marketplace effectively prevents shortages by keeping supply and demand balanced.

Finally, the development of new media, particularly cable access and online interactive services, has made it possible for every would-be local speaker to have entry to means of mass communication. Such speaker access entry comes at a lower price, in real terms, than any other form of mass communication, with the potential to reach the widest audience. Significantly, these ample means of local speaker outlet access permit the widespread communication of diverse viewpoints

⁴⁶ See *Drudge Report* <<http://www.drudgereport.com>>.

⁴⁷ See, e.g., *Review of the Radio Industry, 1997*, MM Docket No. 98-35 (Mar. 13, 1998) at 11.

without the need to own a local media outlet.

Hearst-Argyle submits that, in light of all the evidence, the spectrum scarcity rationale can no longer serve to equate local viewpoint diversity with local ownership diversity. The justification for prohibiting common ownership of a co-located newspaper and broadcast station—the need for ownership diversity to assure viewpoint diversity—is therefore no longer available. In fact, there is no evidence that this ownership restriction has affirmatively promoted local viewpoint diversity. The public interest is best served by a competitive marketplace, both for media outlets and for ideas, and the Commission should be seeking ways to insure those markets operate as efficiently as possible.

There is no reason to expect that repeal of this rule will result in a local media oligopoly that essentially monopolizes local viewpoints.⁴⁸ For example, there is no newspaper/cable cross-ownership ban, and the lack thereof has not resulted in any discernible loss of viewpoint diversity or rise in anti-competitive behavior. Yet cable systems control dozens of video and audio transmission paths while a broadcast station does not—a critical distinction. Moreover, repeal of the newspaper/broadcast cross-ownership rule will, in fact, produce economic efficiencies and eliminate economic inefficiencies. Currently, the Commission's ownership rules tilt against would-be owners of co-located newspapers and broadcast stations; other owners of co-located media outlets are not similarly placed at a competitive disadvantage. The rule prevents both the purchase of a weak outlet, which otherwise could prevent the loss of a significant platform, as well as the purchase of a strong outlet, in which a common owner might immediately concentrate on developing

⁴⁸ Again, Hearst-Argyle emphasizes that the operating assumption should be one favoring open competition and that the burden should rest with the Commission to show that retention of this rule remains in the public's best interest.

synergies, such as a website that includes in-depth reporting on local news (via the newspaper's strengths) and accompanying video clips (via the television station's strengths). In addition, repeal of the rule could lead to other economic benefits, such as cross-marketing, cross-branding, cost-sharing of certain administrative and overhead expenses, and the development of 24-hour news delivery systems that focus on local issues. Hearst-Argyle fully anticipates that repeal of the rule will generate growth in media markets generally, spur innovative cross-platform products and services, and further open the marketplace of ideas itself.

V. Because The Two Assumptions Ultimately Justifying The Newspaper/Broadcast Cross-Ownership Rule Are No Longer Valid, The Rule Is Untenable And Should Be Repealed

In its report adopting the newspaper/broadcast cross-ownership rule, the Commission recognized that it is "obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as *it is*, not was."⁴⁹ Moreover, the Commission acknowledged that the policy that best serves the public interest is not necessarily a static one and, accordingly, that the Commission cannot be "excused from its continuing responsibility to seek to further the public interest which may cause it to reach a different conclusion twenty-two years later."⁵⁰

It is now twenty-three years later. The newspaper/broadcast cross-ownership rule reflects the local competitive and regulatory environment at the time of the rule's adoption. It is now time to reach a different conclusion about the wisdom, efficacy, and necessity for the rule.

While the Commission, in promulgating the rule, sought to promote the twin goals of local

⁴⁹ *Second Report and Order* at ¶ 100 (emphasis added).

⁵⁰ *Id.* at ¶ 20.

viewpoint diversity and economic competition, those goals, in turn, rested on two assumptions, that physical spectrum was scarce and that a visible regulatory hand was favored over the free market. Whether or not either assumption was warranted at the time, the dynamics of technological innovation, competitive market forces, and changing sentiment both at the Commission and on Capitol Hill have rendered both assumptions invalid in this context. There has been explosive growth in the number of local media outlets. Simultaneously, a multiplicity of new media have emerged, and, through technological and economic forces beyond the Commission's control, they are converging into a form collectively known as "cyberspace." These developments together have effaced whatever logic the spectrum scarcity rationale ever had. At the same time, the newspaper/broadcast cross-ownership rule should be subject to a heightened scrutiny to justify its retention, as the congressionally-mandated biennial review supports the general presumption that this local ownership restriction is contrary to free, open, and vigorous competition.

The two critical assumptions underpinning the newspaper/broadcast cross-ownership rule no longer apply. Yet these assumptions were all that permitted countenance of a rule antithetical to competition. Hearst-Argyle submits that the newspaper/broadcast cross-ownership rule is no longer supportable as a matter of logic and sound public policy. It should be repealed outright.

Our democratic society was founded on, and has flourished as a result of, not only the free flow of information and ideas but also the free flow of goods and services; in short, a competitive, capitalistic marketplace. But both marketplaces are hampered by a newspaper/broadcast cross-ownership rule that produces an increase in ownership diversity of only one or two entities per market at most.

Other than the few remaining grandfathered combinations, the newspaper/broadcast cross-ownership rule has prevented the common ownership of co-located newspapers and broadcast